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IN THE

# Supreme Court of the United States

October Term, 1965.

No. 1330

AMERICAN TRUCK RENTAL CORP.,
*Petitioner,*

*v.*

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

*To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:*

Petitioner, American Truck Rental Corp., prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on February 16, 1966.

## OPINIONS BELOW.

The opinion of the Tax Court is printed in the Appendix For Petitioner printed for the use of the Court below, copies of which are filed with this Petition in conformity with paragraph 4 of Rule 21 and is reported in 24 TCM 38. The opinion of the Court of Appeals for the Third Circuit, printed in Appendix A hereto, *infra,* p. 19, is reported in 355 F. 2d 928.

## JURISDICTION.

The judgment of the Court of Appeals was entered on February 16, 1966, Appendix B, *infra,* p. 21. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

## QUESTIONS PRESENTED.

The Petition presents the following questions:

1. Whether gain realized by a taxpayer by virtue of an award received for the condemnation of its property is subject to the provisions of Section 1033(a)(3)(A) of the Internal Revenue Act of 1954, excepting gain from recognition where the taxpayer purchases stock in the acquisition of control of a corporation owning other property similar or related in service or use to the property condemned, notwithstanding the taxpayer executes and delivers its promissory demand judgment note for a major portion of the purchase price of such stock in amount equal to the award and having equivalent bona fide value.

2. Whether such taxpayer may be deprived of the benefits of Section 1033(a)(3)(A) by reason of thereafter borrowing funds to repay such promissory demand judgment note.

## STATUTE INVOLVED.

The statutory provision involved is Section 1033 of the Internal Revenue Code of 1954, 26 U. S. C. 1033, the pertinent portions of which are printed in the Appendix C hereto, *infra*, p. 22.

## STATEMENT OF THE CASE.

In 1947 American Truck Rental Corp., a Pennsylvania corporation, hereinafter sometimes referred to as "Rental", purchased 3.278 acres of land in Philadelphia for $16,009.93 which thereafter was improved with buildings and other structures. It used the premises for its corporate business purposes including leasing, repairing, maintaining and storing of automobiles, tractors, trailers and other vehicles. It also rented trucks and rigging equipment to and otherwise engaged in business and dealt with E. A. Gallagher and Sons to which it also leased the aforementioned premises. The tenant erected buildings and other leasehold improvements [1] (8a, 41a).[2] In 1950 the City denied permission to erect any additional buildings because such construction would have conflicted with planned municipal improvements. The property was condemned by the City on December 19, 1951 effective as of January 1, 1952. Physical possession of the property was taken by the City on or about February 1, 1955.

Rental sued to recover compensation in the Court of Common Pleas in Philadelphia County. It was awarded $166,117.22, which was paid and received in March 1958.

Arthur A. Gallagher owned all of the outstanding common stock and approximately 2.6% of the outstanding preferred stock of Rental. His mother, sisters and brothers owned the balance of the preferred stock. He was also a partner of E. A. Gallagher & Sons in which he held a 15% partnership interest and a one-thirteenth interest in his father's estate which owned the remaining 85% partnership interest.

On October 10, 1958, Rental acquired 80% of the capital stock of A. A. Gallagher Warehousing Corp., hereafter sometimes referred to a "Warehousing", by purchasing

1. The leasehold improvements were erected prior to 1955 and not in 1955 as the Tax Court misunderstood and stated (8a).

2. All page references, unless otherwise specified, are to pages in the Appendix for Petitioner in the Court below, copies of which are filed with this Petition.

300 shares of Warehousing stock from Arthur A. Gallagher for $300 (for which amount it had been issued to him at par value by Warehousing prior to 1958 [45a]) and by acquiring 500 shares Warehousing stock which Warehousing issued directly to it. Rental paid for the 500 original issue shares by executing and delivering its demand judgment note (Exhibit R, 63a) dated October 10, 1958, in the amount of $116,217.35 (47a, 48a). Following these transactions the capital stock of Warehousing was owned 80% by Rental and 20% by Arthur A. Gallagher.

Rental paid its demand note on November 14, 1958 by its check in the amount of $116,217.50[3] drawn on its account in the Broad Street Trust Company, to the order of Warehousing (47a, Exhibit S, 64a).

After issuance of the demand judgment note, as well as after its subsequent payment, Rental was a thoroughly solvent corporation having a net worth of $259,021.47 (60a), over and above all liabilities including the note. The intrinsic value of the 800 shares of Warehousing stock held as an asset by Rental, predicated upon the $768,000 fair market value of Warehousing's Tasker Street property as determined by the Internal Revenue Service valuation engineer (21a, 24a), actually increased Rental's net worth by an additional $174,400.

Warehousing had been incorporated in Pennsylvania on July 10, 1952, to operate warehouses and conduct a general warehousing business in which it became actively engaged on September 30, 1958.

On the latter date it purchased a 16-acre industrial port property located on the Delaware River at Tasker Street in Philadelphia, referred to as the Tasker Street property, on which there were various buildings, docks and piers. It was purchased for $550,000, by taking subject to the balance of an existing mortgage in the sum of $236,500 (46a), and by creating a second mortgage of $313,500 (46a). Warehousing also expended an additional

3. The 15¢ difference between the amount of the note and the check corrected an error in that amount.

$46,614.15 (46a) to conclude its purchase. Internal Revenue Service valuation engineers determined the reasonable fair market value of the Tasker Street property was then at least $768,000 (24a, 25a, 62a).

After Rental acquired 80% of Warehousing stock the Tasker Street property was used for the same purposes as the condemned property formerly owned by Rental, including use by both companies in the conduct of their respective business operations which included a lease to the partnership.

Rental reported the condemnation, and its receipt of the condemnation award in its 1958 income tax return. It further stated therein that it had elected under section 1033 of the Code not to recognize the gain realized on the involuntary conversion of its premises and accordingly had acquired 800 shares of the outstanding stock of Warehousing which owned the Tasker Street property.

Upon examination of Rental's 1958 income tax return, the Internal Revenue agent recommended that $145,661.99 be considered as a taxable long-term capital gain, computed as follows:

| | | |
|---|---|---|
| Condemnation award by City of Philadelphia | | $166,117.22 |
| Less: | | |
| 1947 Cost of land | $16,009.93 | |
| 1958 Appraisal fees paid | 4,000.00 | |
| 1958 Cost of mandamus policy | 445.30 | |
| Gain realized by American Truck Rental Corp. | | $145,661.99 |

The Commissioner of Internal Revenue adopted the recommendation of the revenue agent and upon the basis of such determination assessed an income tax deficiency in the sum of $37,091.46. Rental thereupon petitioned the Tax Court of the United States for a redetermination of that deficiency, and thereby invoked the jurisdiction of that court.

All facts as requested by each party were stipulated before the Tax Court (32a), subject however to materiality and relevancy, in conformity with the requirements of Rule 31(b) of the Rules of Practice for the Tax Court of the United States.

The Commissioner disputed the validity of the transaction, contending that Rental's purchase of 800 shares of Warehousing stock was lacking in economic substance (19a); that Rental did not make a bona fide investment of the condemnation proceeds (15a, 17a, 19a, 20a), or their equivalent in the stock of Warehousing (15a, 20a), and therefore did not "purchase stock" in acquiring control of a corporation owning the replacement property within the meaning of § 1033(a)(3)(A) of the 1954 Code (15a), nor become entitled to its benefits.

The Tax Court sustained the Commissioner's determination (20a). It held that the transaction did not constitute a bona fide stock purchase within the intendment of § 1033(a)(3)(A) of the Code, and amounted to no more than a sham transaction. In so holding, it not only disregarded undisputed and established facts but also applicable principles in decisions of this Court. Moreover, it invoked and relied upon the property valuation report of a valuation engineer for the Internal Revenue Service to support increased tax and decreased depreciation for the premises in a related case involving Warehousing (20a), but disregarded the import of that identical report (confirming the $768,000 fair market value of the Tasker Street property) for the purpose of fixing the value of Warehousing stock (19a) which Rental purchased and held as an asset. The Tax Court thus erroneously states that acquisition of Tasker Street property by Warehousing "added nothing whatever to its net worth since the property was purchased entirely with mortgages equal to its purchase price of $550,000." (19a).

Rental thereupon filed its Petition for Review of that decision. The Court of Appeals for the Third Circuit affirmed.

## REASONS FOR GRANTING WRIT.

This Petition for Writ of Certiorari is based on reasons which are threefold in character:

1. The general public importance of the problem involved;

2. The conflict in principle between the decision of the Court below and decisions of this Court; and,

3. Erroneousness of the decision below.

The Court of Appeals for the Third Circuit has decided an important question of federal tax law which has not been, but should be, settled by this Court. By affirming the Tax Court, it has decided that tax free benefits provided by § 1033 of the Internal Revenue Code are not applicable to an owner of property taken by condemnation who purchases stock in the acquisition of the control of a corporation owning property similar or related in service or use to the property so converted, where such owner pays for the stock by its corporate promissory demand note of bona fide equivalent value.

The social, economic and legal implications arising out of the decision below and of the particular transaction in issue—the purchase upon credit of replacement property or the stock of a corporation owning such property—is of importance to all persons and business concerns who must undertake to replace property with respect to which they receive more than original value, and which has been destroyed or otherwise lost by theft, seizure, requisition or condemnation, and who must or desire to reply upon their credit to accomplish that purpose.

Moreover the decision of the Court below in several areas is in substantial conflict with decisions of this Court.

By its affirmance of the Tax Court, the decision of the Circuit Court clearly conflicts in principle with the recent decision of this Court in *Commissioner of Internal Revenue*

*v. Brown, et al.*, 380 U. S. 563 (1965) in that the Court below affirms that a bona fide promissory demand note, issued by a solvent maker, will not serve as valid consideration to support a purchase of stock.

The disputed issue involves not merely application of the Internal Revenue Code to the circumstances of this particular case, but to all § 1033(a)(3)(A) situations where replacement property is acquired on credit. A matter of general importance is involved therefore and should be reviewed to assure uniformity of decisions for all taxpayers.

The basic question is of broad importance. Many condemnations and other types of property loss are occurring daily throughout the nation. In numerous instances replacement of that property is a common necessity and involves application of § 1033. Common knowledge confirms that in most instances replacement must be in whole or part accomplished on a credit basis of varying amount. The disputed decision therefore has actual and practical effect upon numerous property owners in all such circumstances.

This case tests the right of all such owners of involuntarily converted property to obtain replacement property on a bona fide credit basis. The decision of the Court below does not merely deny the right to purchase on substantial credit—but goes beyond that and denies such right because of arrangements made for discharging the credit obligation.

This Court has never undertaken to review any situation where replacement of property, for compliance with § 1033(a)(3)(A) of the Internal Revenue Code, was effectuated by purchase on a substantial and bona fide credit basis. Individuals and business concerns are constantly purchasing replacement property, or controlling stock of a corporation which owns it, substantially on a credit basis. The negative effects of the decision in this case are therefore of major significance and importance,

especially to business concerns of moderate size and all owners with limited cash resources.

Settlement of the fundamental question by this Court is plainly in the public interest, since it is likely to be present in varying degree in almost every instance in which property is taken by condemnation or otherwise involuntarily converted.

In the *Brown* case the Commissioner, speaking through the Solicitor General conceded that notwithstanding the disputed transaction made no economic sense and could be explained only by a hoped for tax benefit, it had "substance" and was "real" and not a "sham". The Solicitor General acknowledged that the "substance" of that transaction depended upon the "substance" and meaning of the word "sale", as used in the tax statute. He stated, page 16 of his petition:

> "The characteristics essential to a 'sale' are, of course, unmistakably present in a transfer of property in exchange for immediate and full payment in cash or other property. They are also present in—are indeed the essence of—a credit sale in which the buyer either makes a substantial down payment, pledges other assets as security, assumes a meaningful personal liability (i.e. of a solvent entity), or provides some other form of guaranty."

Those characteristics are present in the Rental transaction above described.

In *Brown* this Court held that a noninterest bearing promissory note of a purchaser which had been executed and delivered as consideration for the sale of stock, and notwithstanding it did not even express any absolute personal obligation of the maker for payment, was nevertheless legally sufficient to support a sale of stock involving important tax consequences.

In *Brown* this Court also recognized and held that a "sale", is a common event in the non-tax world; and since

it is used in the Code without limiting definition and without legislative history indicating a contrary result, its common and ordinary meaning is persuasive of its meaning as used in the Internal Revenue Code.

This Court also considered the meaning of a "sale" as defined in the Uniform Commercial Code, and concluded that words should be accorded their normal meaning.

"Purchase" which is the correlative of "sale" is used in Section 1033(a)(3)(A) of the Code.

Its *ordinary* meaning as defined in Webster's New Collegiate Dictionary (1961) is "to obtain by paying money or its equivalent; to buy for a price."

"Purchase" is also defined in the Uniform Commercial Code, § 1-201 (32) and contemplates taking by sale.

It is also incorporated into the Uniform Commercial Code—Investment Securities, § 8-102 (6) which governs sale of stock.

"Purchase" and "Sale" are correlative terms because there can be no "sale" unless there is a "purchase" and there can be no "purchase" unless there is a "sale": *Butler v. Thomson*, 92 U. S. 412 (1875).

In the instant case the Court below, by affirming the Tax Court, strikes down a "purchase" of stock for which a solvent purchaser delivered its unconditional demand judgment note, notwithstanding there was a "sale", and correlatively a "purchase" within the ordinary meaning of those words. In so holding, it has brought itself into conflict with the holding of this Court in the *Brown* case.

A correct decision in this case is of major importance to fair and impartial administration of the Internal Revenue Code, and in particular for proper application of the Code to all owners of property which is involuntarily and compulsorily converted.

It is of specific importance to all owners who purchase replacement property similar or related in the service or use to the condemned property, or who for that purpose purchase 80% of the stock of a corporation owning such

property, and who are intended by Congress to be entitled to the benefit of § 1033 notwithstanding the replacement property or stock is acquired for valuable consideration other than the specific cash proceeds of the condemnation, but having equivalent value.

The history of § 1033(a)(3)(A) confirms there may be compliance without investing the specific proceeds received from the condemnation award. Until the enactment of § 112(f) of the 1939 Code, which was the predecessor section to § 1033(a)(3)(A), a taxpayer who did not reinvest *the specific proceeds* from a condemnation, or who used any part of the proceeds from the converted property to pay off the indebtedness on the converted property—was required to pay a tax on the gain to the extent *specific proceeds* were not reinvested or were otherwise used for payment of such indebtedness. This was because the fund was traced. In 1951, when Congress addressed itself to the problem relating to the income tax treatment of gain realized on an involuntary conversion of property, it enacted § 112(f) after a report from the various committees including Senate Report No. 1052, 82nd Cong. 1st Sess. in which it is stated, (page 1, 3) *that the bill eliminates the requirement of existing law that the taxpayer, in order to have the benefits of section 112(f), must trace the proceeds from the converted property into the replacement property;* and that it is sufficient if the taxpayer, for the purpose of replacing the property so converted, purchases property similar or related in service or use to the property so converted or purchases stock in the acquisition of control of a corporation owning such property.

The resulting investment in replacement property, whether in real estate or stock of another corporation, to qualify for the benefit of § 112(f) now § 1033(a)(3)(A) need not involve the use or investment of *money* or any part of the specific proceeds of the conversion. Nor is there any requirement of § 1033(a)(3)(A) that the replacement property be acquired wholly or partially for cash: See

I. R. C. § 1033(a)(3)(A); § 1012; 3 Mertens—*Law Of Federal Income Taxation*—1965 Ed. § 20.173, page 783; § 20.175, page 788; *Wala Garage Inc. v. United States,* 163 F. Supp. 379 (Ct. Cl. 1958). The only stated requirement is a *purchase* of qualified replacement property or stock "for the purpose of replacing the property so converted." The terms and conditions relating to *payment* for such property are not dictated by any provision in that section, and therefore are for the taxpayer to arrange: See § 1033(a)(3)(A); 26 CFR 1.1012.1(a); 3 Mertens—*Law Of Federal Income Taxation*—1965 Ed. § 20.173, page 783; § 20.175, page 788; *Wala Garage Inc. v. United States, supra.*

The Court below, by affirming the Tax Court has undertaken to invoke, and in substance apply in a § 1033 (a)(3)(A) situation, the statutory provisions of § 1033 (a)(2) which are applicable only to involuntary conversions which occurred *prior to* 1951.

The distinction between the two subsections is self-evident. The former requires the expenditure of the "money". The latter requires merely the "purchase" of property or stock, without specifying or referring to "money" or any expenditure thereof, or to any particular kind of consideration which must be used for "purchase" of the replacement property or stock. Neither the Court below nor the Tax Court heeds the distinction.

Thus there is special and exceptional importance for reviewing the decision of the Court below because of the fundamental character of the statutory interpretation involved.

In the absence of such review not only will tax benefits intended by Congress be denied to the Petitioner, but application of those principles in the decision of the Court below and of the Tax Court, will cause such benefits to be denied to all other owners who would purchase replacement property on a substantial credit basis or have need for doing so. The purchase of replacement property for which payment is made or to be made by delivering a bona fide de-

mand obligation of a solvent maker will thus be denied as a method of replacement, and to the hardship of such affected owners. Without review, the decision of the Court below is precedent for extending denial of intended tax relief by the simple expedient of labeling any credit transaction a "sham".

Moreover, the decisions of the Courts below sanction disregard of subsequent payment of the credit obligation by disregarding that factual accomplishment (47a, 64a).

The doctrine of the decisions in the Courts below may thus be extended, and applied just as readily against other affected property owners.

While *Filippini v. United States,* 318 F. 2d 841 (C. A. 9th, 1963), cert. den. 375 U. S. 922, had been relied upon by the Tax Court (17a), that decision does not require, nor purport to require, an investment of the actual proceeds from the condemnation award in the replacement property, as in effect required the Court below and the Tax Court—but only that there be "a substantial continuance of the taxpayer's prior commitment of capital" in replacement property or stock. With that requirement Rental had complied. By executing and delivering its corporate note Rental committed $166,217.35 of its capital for the stock of Warehousing. This was a continuance of its prior commitment of capital in business premises. Yet the Courts below held this to be insufficient, and in so doing opened wide the door to reject almost any purchase of replacement property which is predicated in whole or part on a credit obligation.

The Court erred in affirming the Tax Court, which in this case held the transaction in question does not constitute a bona fide stock purchase within the intendment of section 1033(a)(3)(A) of the Code and amounted to no more than a sham transaction, citing *Knetsch v. United States,* 364 U. S. 361 (1960); *Higgins v. Smith,* 308 U. S. 473 (1940); *Eli D. Goodstein,* 30 T. C. 1178, aff'd 267 F. 2d 127 (1959 C. A. 1st); *Joseph H. Bridges,* 39 T. C. 1064, aff'd 325 F. 2d 180 (1963 C. A. 4th) (20a). This distorts the holding in those cases.

The rule that the substance of a transaction rather than its mere form, controls tax liability, is one of wide application. *Form* is a pattern or scheme, the aspect under which a thing appears, as distinguished from *substance* which is that which underlies all outward manifestations—the reality itself.

The Court below disregards this principle by affirming the Tax Court and is thereby in conflict with the decisions of this Court on that subject.

The substance of the transaction between Rental and Warehousing on October 10, 1958 is a *factual* and *admitted* acquisition by Rental of 800 shares of Warehousing stock for which Warehousing admittedly made a small cash payment and executed and delivered its $166,217.35 corporate demand judgment note for the balance. No evidence controverts the bona fide value or validity of that obligation. That is the reality itself.

The transaction was real and legitimate in the commercial world and should be so recognized for tax purposes as well: *Knetsch v. United States, supra.*

In the *Filippini* decision relied upon by the Tax Court (17a), the Court held that whether replacement property was similar or related in service or use to the condemned property turned upon whether in all the circumstances it represented a substantial continuation of the taxpayer's prior commitment of *capital*, or a departure from it. The same test should be applied where replacement of property is accomplished by purchase of stock in the acquisition of control of a corporation owning such property. That Rental did continue its prior commitment of capital was *disregarded*, and thereby so were the decisions of this Court, and of other Circuit Courts of Appeal which in fact follow *Fillipini.*

Because Rental *borrowed* the sum required by it for payment of its October 10, 1958 demand judgment note, which note it *admittedly* paid by its own check on November 14, 1958 (47a, 48a, Exhibit S, 64a), such payment has

been denied legal recognition and the entire transaction has been dismissed as meaningless. This conflicts in principle with the decision in the *Brown* case wherein this Court upheld the sale of assets to an ultimate purchaser made in consideration for a promissory note which in turn was payable by that ultimate purchaser out of the profits of the business enterprise of which the original sellers were the principal stockholders. Moreover the decision of the Tax Court, which was affirmed by the Court below, disregards the *admitted fact* (47a, 48a) of payment—and also disregards the legal sufficiency of the demand note to alone support compliance with the requirements of § 1033(a)(3)(A).

Even before payment of the demand note on November 14, 1958, Rental had on October 10, 1958 issued and delivered its demand note in consideration for the Warehousing stock. The purchase of the stock in consideration for the note then and thereby committed Rental and the capital of Rental to payment of the note for purchase of the replacement property—and thereby accomplished a substantial continuation of Rental's prior commitment of capital which had been in real estate. Upon purchase of the stock, Rental's prior commitment of capital then was continued in the converted form of stock of a company which owned real estate similar and related in use and purpose to the condemned property in which Rental's capital had been previously committed.

In *Weiss v. Stearn*, 265 U. S. 242, 254 (1924), and numerous other decisions, this Court has held that questions of taxation must be determined by viewing what was actually done, and when applying the provisions of the Sixteenth Amendment and income laws enacted thereunder matters of substance and not mere form must be regarded. The decision of the Court below in fact conflicts in principle with those decisions.

It is not unusual that the form of a transaction will be disregarded if it has no other purpose other than reduction of taxes—but where the form and substance of a transaction

is undertaken to comply with an expressed provision of the Code to obtain the intended tax benefit, the transaction should not be regarded as a sham or tax avoidance but rather as a matter of sanctioned compliance with requirements of the Code.

Many of the decisions which involve the principle of substance versus form arise because the government suspects a tax avoidance motive. However, such a motive will not establish liability if the transaction does not do so without it, and while the possible existence of such a motive may influence an attack upon the transaction it is the real purpose which is controlling.

In the leading case of *Gregory v. Helvering,* 293 U. S. 465, 468 (1935), this Court held in the course of considering another Code section that the *substance* of a transaction must be upheld where every element required by the Code is to be found in what was done.

The decision of the Court below in that regard conflicts in principle with the decisions of this Court and that of other Circuits in another respect.

It is the intention of Congress that gain realized as the result of involuntary conversion should be exempt from tax. It enacted § 1033 as a relief measure to benefit owners who are compelled to experience a gain beyond their control. Owners are thereby furnished some measure of protection. It enacted § 1033(a)(3)(A) to provide an owner a choice of methods for acquiring replacement property, one of which it specified could be purchasing stock in the acquisition of control of a corporation which owns property similar or related in use to that which had been involuntarily converted. An owner who seeks to avail himself of such intended benefit should be entitled to have the relief provisions construed liberally in his favor, and certainly should not be regarded in the category of either an evader or an avoider of tax, nor adjudged from such viewpoint.

It is well settled that § 1033 of the Internal Revenue Code of 1956 is a relief provision: *Washington Railway & Electric Co. v. Commissioner,* 40 B. T. A. 1249 (1939).

A relief provision should be construed liberally to effect its purpose. *Helvering v. Bliss,* 293 U. S. 144 (1934); *U. S. v. Pleasants,* 305 U. S. 357, 363; *Gould v. Gould,* 245 U. S. 151 (1917).

The Court of Appeals, by affirming the Tax Court, construed this section of the statute strictly rather than liberally and accordingly its decision does not accord with the law as established by this Court in connection with statutory relief measures. Rental was denied the tax relief benefit because it purportedly had not "purchased" the stock of Warehousing.

*Knetsch v. United States, supra, Higgins v. Smith, supra,* and the lower Court decisions upon which the Tax Court relied involved situations created to effectuate interest deductions for tax avoidance purposes, and losses arising out of security sales to a wholly owned corporation. They have no application to a remedial statute such as § 1033 (which is the counterpart of § 112(f) which was not involved in the *Knetsch* or *Higgins* cases) and have no reasonable bearing here.

It is important that this Court settle the question whether the doctrine of *Knetsch v. United States* and *Higgins v. Smith, supra,* should be extended and applied to such circumstances as are here involved and in which relief provisions are to be interpreted.

The principle applicable to appellate review stated in *Commissioner v. Duberstein,* 363 U. S. 278 (1960), relied upon by the Court below, do not preclude, and to the contrary upholds appellate review of any Tax Court decision where an erroneous inference is drawn from documents or undisputed facts, and where the holding is clearly erroneous as it is in this case. Nor is appellate review restricted where the appropriate principles in controlling decisions of this Court are misapplied: *United States v. United States Gypsum Co.,* 333 U. S. 364, 365 (1947).

A proper adjudication of this single transaction cannot be expected to solve all problems and the court is not

asked to decide more than this case. Yet there is no existing guide for future owners in similar transactions. A decision of this case, while not providing a blueprint for all subsequent cases, would at least negate misconceptions created by the decision of the Court below and will focus attention on the proper and relevant factors. The problem is pervasive, and the task, one that only this Court can perform.

## CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HERMAN J. OBERT,
*Attorney for Petitioner.*

*Of Counsel:*
CUSHMAN & OBERT.

May 12, 1966.

# APPENDICES.

## APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15481

AMERICAN TRUCK RENTAL CORP.,
*Petitioner,*

*v.*

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

Argued February 1, 1966

Before STALEY, SMITH and FREEDMAN, *Circuit Judges.*

### OPINION OF THE COURT

(Filed February 16, 1966)

PER CURIAM

The sole question raised by this appeal is whether the petitioner is entitled to non-recognition of a gain realized from the involuntary conversion of its property within the meaning of § 1033(a)(3)(A) of the Internal Revenue Code of 1954. Petitioner claims that it purchased a controlling interest in a corporation which held property similar to or related in service to that which was involuntarily converted, and thus, satisfied the requirements of that section.

The Tax Court analyzed the facts before it and concluded that the transactions resulting in the purchase of corporate stock lacked economic substance and, in fact, "amounted to no more than a sham * * *." Our examination of the record discloses no clearly erroneous finding of basic facts by the Tax Court. Therefore, those determinations must remain undisturbed. Commissioner v. Duberstein, 363 U. S. 278 (1960). It is also well settled that where the ultimate determination reasonably flows from the basic facts and those basic facts are persuasive of the ultimate fact, the Tax Court's conclusion will not be altered or modified. The Tax Court's conclusion here was clearly a permissible one. Simon v. Commissioner, 285 F. 2d 422 (C. A. 3, 1960); Heebner v. Commissioner, 280 F. 2d 228 (C. A. 3, 1960); Pennroad Corp. v. Commissioner, 261 F. 2d 325, 328 (C. A. 3, 1958), and cases cited therein.

The decision of the Tax Court will be affirmed.

## APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15481

AMERICAN TRUCK RENTAL CORP.,
*Petitioner*

*v.*

COMMISSIONER OF INTERNAL REVENUE,
*Respondent*

(T. C. Docket No. 4871-62)

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES

Present: STALEY, SMITH and FREEDMAN, *Circuit Judges.*

### JUDGMENT.

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

ATTEST:

IDA O. CRESKOFF,
*Clerk.*

February 16, 1966

## APPENDIX C.

### Statute Involved.

Section 1033 of Internal Revenue Code of 1954, 26 United States Code 1033—pertinent sections:

### TITLE 26.—INTERNAL REVENUE CODE

**§ 1033. Involuntary conversions.**

**(a) General rule.**

If property (as a result of its destruction in whole or in part, theft, seizure, or requisition or condemnation or threat or imminence thereof) is compulsorily or involuntarily converted—

**(1) Conversion into similar property.**

Into property similar or related in service or use to the property so converted, no gain shall be recognized.

**(2) Conversion into money where disposition occurred prior to 1951.**

Into money, and the disposition of the converted property occurred before January 1, 1951, no gain shall be recognized if such money is forthwith in good faith, under regulations prescribed by the Secretary or his delegate, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund. If any part of the money is not so expended, the gain shall be recognized to the extent of the money which is not so expended (regardless of whether such money is received in one or more taxable years and regardless of whether or not the money which is not so expended constitutes gain). For

purposes of this paragraph and paragraph (3), the term "disposition of the converted property" means the destruction, theft, seizure, requisition, or condemnation of the converted property, or the sale or exchange of such property under threat or imminence of requisition or condemnation. For purposes of this paragraph and paragraph (3), the term "control" means the ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock of the corporation.

**(3) Conversion into money where disposition occurred after 1950.**

Into money or into property not similar or related in service or use to the converted property, and the disposition of the converted property (as defined in paragraph (2)) occurred after December 31, 1950, the gain (if any) shall be recognized except to the extent hereinafter provided in this paragraph:

**(A) Nonrecognition of gain.**

If the taxpayer during the period specified in subparagraph (B), for the purpose of replacing the property so converted, purchases other property similar or related in service or use to the property so converted, or purchases stock in the acquisition of control of a corporation owning such other property, at the election of the taxpayer the gain shall be recognized only to the extent that the amount realized upon such conversion (regardless of whether such amount is received in one or more taxable years) exceeds the cost of such other property or such stock. Such election shall be made at such time and in such manner as the Secretary or his delegate may by regulations prescribe. For purposes of this paragraph—

(i) no property or stock acquired before the disposition of the converted property shall be considered to have been acquired for the purpose of replacing such converted property unless held by the taxpayer on the date of such disposition; and

(ii) the taxpayer shall be considered to have purchased property or stock only if, but for the provisions of subsection (c) of this section, the unadjusted basis of such property or stock would be its cost within the meaning of section 1012.

**(B) Period within which property must be replaced.**

The period referred to in subparagraph (A) shall be the period beginning with the date of the disposition of the converted property, or the earliest date of the threat or imminence of requisition or condemnation of the converted property, whichever is the earlier, and ending—

(i) one year after the close of the first taxable year in which any part of the gain upon the conversion is realized, or

(ii) subject to such terms and conditions as may be specified by the Secretary or his delegate, at the close of such later date as the Secretary or his delegate may designate on application by the taxpayer. Such application shall be made at such time and in such manner as the Secretary or his delegate may by regulations prescribe.

* * *

(D) * * *

* * *

**(c) Basis of property acquired through involuntary conversion.**

If the property was acquired, after February 28, 1913, as the result of a compulsory or involuntary conversion described in subsection (a)(1) or (2), the basis shall be the same as in the case of the property so converted, decreased in the amount of any money received by the taxpayer which was not expended in accordance with the provisions of law (applicable to the year in which such conversion was made) determining the taxable status of the gain or loss upon such conversion, and increased in the amount of gain or decreased in the amount of loss to the taxpayer recognized upon such conversion under the law applicable to the year in which such conversion was made. This subsection shall not apply in respect of property acquired as a result of a compulsory or involuntary conversion of property used by the taxpayer as his principal residence if the destruction, theft, seizure, requisition, or condemnation of such residence, or the sale or exchange of such residence under threat or imminence thereof, occurred after December 31, 1950, and before January 1, 1954. In the case of property purchased by the taxpayer in a transaction described in subsection (a)(3) which resulted in the nonrecognition of any part of the gain realized as the result of a compulsory or involuntary conversion, the basis shall be the cost of such property decreased in the amount of the gain not so recognized; and if the property purchased consists of more than one piece of property, the basis determined under this sentence shall be allocated to the purchased properties in proportion to their respective costs.

* * *